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Administration of a Law: Federal Rent Control

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THE ADMINISTRATION OF A LAW: FEDERAL RENT CONTROL

I.

The Growth of Our Executive Branch of Government

IT IS fundamental that the United States Constitution establishes a governmental structure in which the legislative, executive and judicial powers are separated so that we have three branches of Government. In the early days of our republic, when this was chiefly an agricultural country and economic and social problems were much less complex than they are today, the problems of government were likewise less involved, so that the doctrine of "separation of powers" was more closely adhered to, and delegation of legislative power to the Executive Branch was more restricted. During this period, Congress exercised its primary function of "making" the law. The Executive Branch, similarly, performed its basic operation of "carrying out" the law. Our courts, in turn, pursued their basic function of "construing" the law.

It is interesting to note that in 1800 our executive departments were limited to six: namely, the State, Treasury, War, Navy, Attorney General and Post Office Departments. It was not until the middle of the Nineteenth Century, after a vast territorial expansion and a tremendous

growth in population, that a new department in the Executive Branch was established. This was the Interior Department, which was created in 1849. The Department of Agriculture was not established until the year 1889. As a result of improvements in transportation, evidenced chiefly by the rapid expansion of our railroad system and the building of new and better roads, interstate commerce was greatly increased. The creation of the Interstate Commerce Commission in 1887, an independent regulatory agency, was a natural result. This was an important step in the development of the organization of the Federal Government.

At the end of the Nineteenth and the beginning of the Twentieth Century, the Executive Branch of our Government was greatly enlarged because of industrial expansion and the development of the corporate entity as the vehicle for carrying on "big business." These changes posed many new economic and social problems which required intervention by the Federal Government. And so we witnessed the creation of more federal agencies and bureaus, and larger delegations of legislative power by Congress to the Executive Branch of the Government. These changes were reflected by the establishment of the Departments of Commerce and Labor in 1903. The most rapid growth in the Executive Branch of our Government, however, took place in the first half of the Twentieth Century. As the President's Committee on Administrative Management, appointed by President Franklin D. Roosevelt, said:[1]

> The executive branch of the Government of the United States has . . . grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm. To look at it now, no one would ever recognize the structure which the founding fathers erected a century and a half ago to be the Government of the United States.

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1 *Report of the President's Committee on Administrative Management in the Government of the United States,* Sen. Doc. No. 8, 75th Cong., 1st Sess. 56 (1937).

International tensions resulting in two World Wars, the great strides made by science in improving methods of production, in developing new methods of transportation and communication, in creating new implements of war, in discovering new approaches to the cure of diseases and in preventive medicine, and the development of a social consciousness—all contributed their part to this expansion, and left their impact on the everyday life of the American people.

II.

Delegation of Legislative Power

It was inevitable that as the processes of Government became more complex, the delegations of legislative power to the executive departments would increase. Throughout our history tests have been made of the constitutionality of such delegations. With rare exceptions the delegations have been sustained as valid by the United States Supreme Court. Originally, such delegations of power were sustained on the theory that they were not delegations of *legislative* power. Our highest tribunal repeatedly held that if Congress established the policy and set up adequate standards, it could authorize the Administrator to "fill in the details"; or, stated another way, if Congress defined the subject matter and the end which was to be attained, it could leave to the Administrator the power to implement the legislation. In more recent years, our highest Court has taken a more realistic viewpoint and openly recognizes the existence of delegation in some cases, justifying the delegation on the basis of the "necessities" of our political and governmental life. As Elihu Root so aptly stated as early as 1916, " . . . the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." [2]

[2] Root, *Public Service by the Bar*, 2 A.B.A.J. 736, 749 (1916). See also, as regards delegation of legislative power, Jaffe, *An Essay on Delegation of*

There can be no doubt that many of the decisions of our highest Court were greatly influenced by the social and economic conditions prevailing at the time the decisions were made. As the need for greater delegation became apparent, because of the complexities in our social and economic life, the United States Supreme Court expanded its interpretation of the separation doctrine. This is particularly true of legislation based on the War Powers of Congress.

Although great progress has been made in the "streamlining" of Congress, so that the legislative committees have been reduced in number, and individual Congressmen have more time to spend on the committees to which they are assigned, nevertheless, the problems before Congress today are so diverse, so complex, and so technical that in a great many instances Congress can do no more than lay down general principles of law and leave to the administrative agency the duty of detailing the law. Although there are undoubtedly great dangers in wide delegations of legislative power to the Executive Branch of the Government, it must be remembered that Congress controls the delegation in many ways—it always retains the power to repeal or amend a law—and it has a powerful weapon in the control of the "purse-strings." Moreover, the courts are a great barrier against the threat to our liberties which may lie in the broad delegation of power, because they have the final word on the construction of the law and may set aside arbitrary determinations of the Administrator.

Many treatises and articles have, of course, been written concerning the constitutionality of legislative delegation by Congress. Many studies have been made of the power and authority to regulate, of the judicial decisions relating to administrative determinations and other phases of

Legislative Power: II, 42 COL. L. REV. 561 (1947); Cousens, *The Delegation of Federal Legislative Power to Executive Officials*, 33 MICH. L. REV. 512 (1934).

administrative law, with the ultimate end, in many cases, of trying to determine how a cloak of protection may be thrown around the rights of the individual against arbitrary action by the Administrator. Such discussions are very profitable and greatly aid us in preserving our democratic processes. The better we understand our legislative, executive and judicial processes—that is, the more light we can throw on their operations and techniques—the better we shall be able to cope with the problems which are fostered by broad delegations.

I shall leave to the legal scholar the problem of determining the extent to which Congress may delegate legislative power and still remain within constitutional bounds, as well as the analysis of judicial decisions on administrative law. As Administrator of a federal agency, the Office of the Housing Expediter, it is my intention in this article merely to examine some aspects of legislative delegation in relation to a particular law, the Housing and Rent Act of 1947 and the amendments thereto,[3] and some of the responsibilities which broad delegations place upon the Administrator of such a law.

III.

Congressional Intent and Its Effect on the Administration of Delegated Powers

The great expansion in the powers of the Executive Branch of the Government, which we have discussed, has correspondingly increased its authority and power over the individual lives of the American people. It has increased the responsibility of this branch of the Government to see to it that, in carrying out the law, the will of Congress is not thwarted and the individual citizen is not deprived of

[3] 61 STAT. 196 (1947), as amended, 50 U. S. C. App. § 1891 *et seq.* (Supp. 1948), as amended, 63 STAT. 18, Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949).

his constitutional and legal rights. In our endeavor to attain these objectives, greater stress must be laid, by both the Administrator of the law and the court which construes it, on the congressional intent in the passing of an act—such intent as is found in the policy declaration in the law itself, in provisions of the law other than that which is being construed, and in the legislative history. In many laws enacted by Congress, although the delegation of power in itself is phrased in very broad terms, the actual delegation is considerably narrowed when viewed in the light of these considerations. An analysis of the Housing and Rent Act of 1947, as amended, will indicate how delegations of power which appear to be very broad have been circumscribed by some of these factors. The law was recently held constitutional by the United States Supreme Court.[4]

In discussing the rent control law, we are considering a law which directly affects a large segment of the American people. This law regulates a 60 billion dollar industry and has a great impact on our entire economy. It presently controls approximately 11 million rental units housing 35 million people, located in areas having a population exceeding 80 million in forty-three different states, Puerto Rico and Alaska.[5] In effect, it determines the investment return of millions of property owners and the amount of rent millions of tenants are required to pay. The law has been the subject of hundreds of cases in the state and federal courts, many of them in the Courts of Appeals and several in the United States Supreme Court.

Federal Rent Control Legislation:

Rent control as a national law was first enacted as a war measure in January, 1942, as part of an over-all price

[4] United States v. Shoreline Cooperative Apartments, Inc., ... U. S. ...., 50 S. Ct. 248 (1949), *reversing*, Woods v. Shoreline Cooperative Apartments, Inc., 84 F. Supp. 660 (N. D. Ill. 1949).

[5] As of Mar. 23, 1950.

control and rationing program. This program was necessitated by the shortage of consumer goods resulting from the war. Provisions for the control of residential rents were contained in the Emergency Price Control Act of 1942.[6] Under this Act, the Price Administrator was granted authority to set up defense-rental areas throughout the United States, its territories and possessions, and in the District of Columbia, where defense-activities were inflating rents. This Act further authorized the Price Administrator to establish and adjust maximum rents on residential property and to regulate the recovery of possession of housing accommodations. It specifically provided for administrative review of orders issued by the Price Administrator, and established the Emergency Court of Appeals with exclusive jurisdiction to review the actions of the Price Administrator. The Act was amended and extended from time to time and expired by its own terms on June 30, 1947.

The present law, the Housing and Rent Act of 1947, as amended, became effective July 1, 1947, and continued the control of housing accommodations in areas which were regulated on March 1, 1947. It froze the maximum rents in existence on June 30, 1947, as determined under the Emergency Price Control Act of 1942, as amended, and delegated to the Housing Expediter the authority to adjust maximum rents and to decontrol areas. Restrictions on the recovery of possession were specifically provided for. The Act made provision for the establishment of local rent advisory boards in each area with authority to make recommendations to the Housing Expediter for increases in maximum rents throughout the area, and for the decontrol of areas. Provision was made for the execution of voluntary leases in which the landlord and tenant could voluntarily agree to increase their maximum rents by fifteen per cent

[6] 56 STAT. 23 (1942).

under certain conditions. This Act, amended and extended by the Housing and Rent Act of 1948 [7] and the Housing and Rent Act of 1949,[8] expires on June 30 of this year.

It was provided in the 1948 Act that in adjusting maximum rents to remove hardships, the Housing Expediter should take into consideration whether the landlord was operating at a loss. The 1949 Act provided that in making rent adjustments the Housing Expediter should, in so far as practicable, observe the principle of maintaining maximum rents at levels which would yield to landlords a fair net operating income. In addition, the 1949 Act restored to the Housing Expediter the power to regulate evictions. It also provided for local option decontrol by states and municipalities. These latter provisions involved a delegation of legislative power which was the subject of an exhaustive note in the Fall, 1949, issue of *The Notre Dame Lawyer*[9] and was made the focus of the unsuccessful constitutional attack on the present law in the recent case before the United States Supreme Court.[10]

I have given this brief history of the most important provisions of federal rent control laws in order to clarify the discussion which follows. I have not mentioned the enforcement provisions of these laws because they are not particularly pertinent to this discussion.

In general it may be said that under federal rent control laws there have been three broad delegations of power to the Administrator: first, to establish and adjust maximum rents; secondly, to decontrol areas and classes of housing accommodations; and, thirdly, to regulate recovery of possession of housing accommodations.

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7 62 STAT. 93 (1948).

8 63 STAT. 18, Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949).

9 25 NOTRE DAME LAWYER 79 (1949).

10 See Note 4 *supra*.

The Power to Establish and Adjust Maximum Rents:

In the Emergency Price Control Act of 1942, Congress authorized the Price Administrator to establish maximum rents which would be "generally fair and equitable" and would effectuate the "purposes" of the Act. The Act then provided: [11]

> So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs.

As a result of this direction, the Price Administrator adopted the "freeze date method" of rent control, and issued regulations making provision for upward and downward adjustments of maximum rents. Section 2(c) of the Emergency Price Control Act of 1942, as amended in 1944, provided in part as follows:[12]

> Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.

The rent regulations were amended in accordance with the above congressional mandate. They provided for ad-

11 56 STAT. 25 (1942).
12 58 STAT. 634 (1944).

justments where, because of "peculiar circumstances," maximum rents were below comparability, and in cases where a landlord was "in a hardship position," because his net operating income had decreased since a period immediately preceding the "freeze date."

In the Housing and Rent Act of 1947, which became effective on July 1, 1947, the Housing Expediter was directed by regulation or order to "make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title." In the 1948 Act, he was authorized to "make such individual and general adjustments in such maximum rents . . . as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title." The Act further provided that "In the making of adjustments to remove hardships due weight should be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations."

In the Housing and Rent Act of 1947, as amended by the 1949 Act, is contained the following direction with reference to the adjustment of maximum rents:[13]

> *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title . . . In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for controlled housing accommodations yields a

13 Section 203(b)(1) of the Act, *supra* note 3.

> fair net operating income from such housing accommodations, due consideration shall be given to the following, among other relevant factors: (A) Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

It is interesting to note that the delegation of authority to the Administrator to adjust maximum rents has been continually circumscribed by subsequent legislation. This is a factor that should not be overlooked when studying problems relating to the delegation of legislative powers. Very frequently, the longer a law delegating legislative power remains on the statute books the more detailed does the legislation become.

In each of the above referred to provisions, although the language of the delegation is very broad in scope, it is subject to much more restrictive interpretation when viewed in the light of the legislative history. Perhaps I could illustrate this point better by referring to the present authority given to the Housing Expediter to adjust maximum rents as stated above.

Under the present law, the Housing Expediter is authorized and directed to make such individual and general adjustments in maximum rents as may be necessary "to remove hardships or to correct other inequities." These are words of art. The expression "to remove hardships" was contained in the 1944 revision of the Emergency Price Control Act, and the phrase "to correct inequities" was first used in the 1947 Act as originally enacted. Such phrases, therefore, were subject to prior administrative interpretation. They were construed to mean, among other things, that a maximum rent should be adjusted when an accommodation had been improved by a major

capital improvement, or by the addition of space, services, furniture, furnishings or equipment, or when there was an increase in the number of sub-tenants, or when a rent was substantially below the rent generally prevailing in the defense-rental area for comparable housing accommodations on the "freeze date." These phrases were likewise construed to mean that maximum rents should be reduced because of deterioration and decreases in space, services, furniture or equipment since the date determining the maximum rent. When Congress enacted the Housing and Rent Act of 1949, it in effect affirmed these prior administrative determinations by using those same words. The administrative duty in such cases seems clear. The Administrator must, in general, abide by the previous construction of such language.

As I pointed out previously, the word "hardship" as relating to adjustments of maximum rents first appeared in the 1944 amendment to the Emergency Price Control Act of 1942. The Price Administrator determined that a landlord was suffering a hardship if his net operating income declined since the "freeze date." The legislative history of the Housing and Rent Act of 1948 indicated that Congress felt that landlords should not be required to continue to operate at a loss merely because they operated at a loss on the "freeze date"; and so the 1948 Act provided that in making rent adjustments "to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations." After the enactment of the Act, the rent regulations were amended accordingly. In the 1949 Act, Congress provided additional relief for landlords by a further qualification of the expression "to remove hardships or to correct other inequities" by incorporating into the law the "fair net operating income" provisions. These provisions had a rather meaningful legislative history.

Lengthy hearings before the Senate and House Banking and Currency Committees preceded the enactment of the Housing and Rent Act of 1949, which amended the Housing and Rent Act of 1947.[14] These committees had the benefit of hearing expert testimony from both landlord and tenant interests. Testimony was received from representatives of large realty groups, such as the National Association of Real Estate Boards, the Metropolitan Fair Rent Committee, the National Apartment Owners Association, the American Hotel Association, the Chicago Residential Hotel Association, and many individual landlords. All of the major veterans' and labor organizations, and several tenant and consumer associations, were also represented at the hearings. The Housing Expediter gave a statement covering all aspects of the proposed legislation and was questioned at length, and a number of Congressmen expressed their views on various phases of the proposed legislation.

At these hearings, considerable discussion was directed toward the liberalization of the rent adjustment provisions. There was some sentiment in both committees in favor of a provision which would authorize and direct the Housing Expediter to adjust individual maximum rents so that a landlord would be guaranteed a fair return on the fair value of his property. All of the established methods for determining values of real estate were fully aired. Experts testified as to their opinion of the rate of return to which a landlord is entitled, and the problems of administering such a formula in an emergency program were thoroughly analyzed.

The House Committee voted out a Bill[15] which contained no provision for rent adjustments based on a fair

[14] See *Hearings before a sub-committee of the Committee on Banking and Currency on S. 434, S. 600, and S. 888,* 81st Cong., 1st Sess. (1949); *Hearings before Committee on Banking and Currency on H. R. 198, H. R. 791, H. R. 1731, H. R. 1851, H. R. 2291, and H. R. 2482,* 81st Cong., 1st Sess. (1949).

[15] H. R. 1731, as reported in the House of Representatives, Mar. 5, 1949.

return, but merely provided that the Housing Expediter be authorized by regulation to "remove hardships or to correct other inequities," and in making adjustments to consider "whether or not the landlord is suffering a loss in the operation of the housing accommodations." Neither did the Senate Committee include a "fair return" provision in the Bill when it was reported to the Senate.[16] The Senate version, however, contained a provision for an overall adjustment of maximum rents on a graduated basis. Maximum rents were to be increased five per cent on October 1, 1949, and another five per cent on April 1, 1950, over the level prevailing on June 30, 1947.

The House of Representatives amended its committee Bill by incorporating a provision for rent adjustments based on "fair return" in the following language:[17]

> In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a *reasonable return (but not in excess of a reasonable return) on the reasonable value of* such housing accommodations. In determining whether the maximum rent for controlled housing accommodations yields *a reasonable return on the reasonable value of* such housing accommodations, due consideration shall be given to the following, among other relevant factors: (A) Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance. (Emphasis supplied.)

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16 H. R. 1731, as reported in the Senate, Mar. 17, 1949.

17 See House debate on H. R. 1731, 95 Cong. Rec. 2224-56 (Mar. 10, 1949); 95 Cong. Rec. 2325-63 (Mar. 11, 1949); 95 Cong. Rec. 2521-47 (Mar. 15, 1949).

The Senate voted down an amendment to the Bill as reported by its committee, which would have incorporated in the Bill the "fair return" provision as passed by the House.[18] The Bill as finally passed by the Senate contained the provision for a five and ten per cent over-all increase in maximum rents. The Senate and House versions were both sent to Conference. The Conference, after lengthy debate, approved neither version but recommended the adoption of the "fair net operating income" provision cited previously.

When the Conference Report was debated in the Senate,[19] there was considerable discussion as to whether the factor of depreciation was deliberately left out of the provisions relating to fair net operating income. Senator Sparkman, Chairman of the sub-committee which conducted the Senate hearings, and a leading member of the Conference, assured his colleagues that every member of the Conference Committee understood and intended that the Housing Expediter should allow depreciation as an operating cost. There was further discussion in the Senate as to the method to be used in determining depreciation. It was contended by some Senators that if the Housing Expediter had to evaluate each structure in order to determine the amount of the depreciation, he would be faced with an impossible task. Senator Sparkman suggested that the Housing Expediter could use the depreciation taken by the landlord on his income tax return. The Bill as reported by the Conference Committee was passed by both Houses of Congress and signed by the President.

Such was the significant portion of the legislative history confronting the Housing Expediter, who was authorized

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[18] See Senate debate on H. R. 1731, 95 Cong. Rec. 2951-86 (Mar. 22, 1949); 95 Cong. Rec. 3070-3132 (Mar. 23, 1949).

[19] See Senate debate on Conference Report, 95 Cong. Rec. 3343-48 (Mar. 28, 1949); 95 Cong. Rec. 3431-45 (Mar. 29, 1949). For House debate on Conference Report, see 95 Cong. Rec. 3401-08 (Mar. 29, 1949).

and directed by Congress to provide by regulation for the removal of hardships and the correction of inequities in maximum rents, and in so doing, to allow landlords a fair net operating income, in so far as practicable.

I stated previously that frequently delegations of legislative powers which apparently are very broad are circumscribed and lessened by the legislative history of the act in question. In the Housing and Rent Act of 1949, the provisions for adjustments of rents are very broad, but when viewed in the light of the legislative history, it will be seen that they tend to narrow considerably. I will explain further why this is so.

First, the legislative history made it very clear that in using the language "fair net operating income," Congress did not intend a fair return on fair value. This was quite obvious because, although such a provision was contained in the Bill passed by the House, the Senate voted down an amendment containing a similar provision and the Conference Report rejected the House provision.

Secondly, the legislative history was very persuasive that Congress intended that the Housing Expediter should allow depreciation as an operating cost in determining fair net operating income, although in the industry depreciation is not considered an "operating cost." This conclusion may be drawn from the statement made by Senator Sparkman to the Senate in discussing the Conference Report. In answer to questions from the floor, he stated that all members of the Conference Committee intended that depreciation be allowed, although the language of the Act did not state specifically that this was a factor to be taken into consideration in determining fair net operating income.

Thirdly, the legislative history indicates, although less clearly, that Congress did not intend for the Housing Expediter to determine the depreciation allowance in each case by first determining the fair or market value of the

property and then applying a depreciation factor. The legislative history of the Housing and Rent Act of 1949 is replete with proof that Congress rejected the "fair return" formula primarily because it believed that it was administratively unfeasible for the Housing Expediter to make millions of property-value determinations. Faced with a similar objection to determining depreciation under the "fair net operating income" provision, Senator Sparkman indicated that a much simpler and more practical method of making depreciation allowances was intended, such as using the amount of depreciation taken by the landlord on his income tax return.

Moreover, in interpreting the "fair net operating income" provision, it must be remembered that the expression "net operating income" has a definite meaning in the industry. It means the difference between income and operating expenses. Interest and amortization of mortgages are not considered operating costs.

The direction to the Housing Expediter that in adjusting maximum rents he should "observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations" is on its face a very broad delegation of power. As is evident, however, when viewed in the light of the legislative history, Congress intended the Housing Expediter to make provisions for rent adjustments "so far as is practicable" in cases where the landlord's "net operating income" is not fair: that is, where his operating expenses, including depreciation, but excluding interest and amortization, are so high that he is not left with a "fair income."

This seemingly very broad delegation of power in reality left to the Administrator only the problem of determining the meaning of "fair" as used in the expression "fair net

operating income," taking into consideration factors specifically mentioned in the Act such as increases in taxes, major capital improvements, etc. It was left to the Housing Expediter to make a factual finding as to what constituted a fair ratio between income and operating costs, including depreciation. Although this still represented a broad delegation of power, it was a prerogative very properly left to the Executive Branch of the Government. This finding, ultimately, was based on a survey of 120 thousand units in ninety-eight cities throughout the United States.

The Power to Decontrol:

Another broad delegation of power in the present rent control law is the authority given to the Housing Expediter to decontrol defense-rental areas or portions thereof, or classes of housing accommodations, either on his own initiative or on recommendation of a local advisory board. He is authorized to take such action:[20]

> . . . if in his judgment the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exist, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met.

Here again the standards are very vague, and therefore the delegations of power to the Administrator are broad. Congress said in effect that the Housing Expediter could decontrol when the demand for rental housing had been met by new construction, or otherwise. Congress did not in the express language of the delegation set up any standards to guide the Housing Expediter in determining when the demand for rental housing would be "reasonably met." It did not, for example, say that he must decontrol when a certain percentage of the rental housing accommodations in an area were vacant, as had been proposed at the hear-

20 Section 204(c) of the Act, *supra* note 3.

ings. It left to the Housing Expediter a wide area of discretion. However, the Housing Expediter was not left without a guidepost, as we shall see.

On June 30, 1947, the remnants of price control were swept away by the expiration of the Emergency Price Control Act of 1942. Congress, taking cognizance of the severe housing shortage in the country, recognized the need for the continuance of rent control by passing the Housing and Rent Act of 1947. In its declaration of policy, Congress stated:[21]

> The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared. . . .
>
> The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations.

At the hearing before the congressional committees preceding the enactment of the 1949 Act, the Housing Expediter pointed out that under prior legislation he was reluctant to decontrol an area if there was a great deal of uncertainty as to whether rents would rise substantially in the event of decontrol, because he had no power to recontrol. He made it clear that if given the power to recontrol he could take decontrol actions more rapidly. In the 1949 Act, Congress gave the Housing Expediter the power to recontrol under certain conditions. This significant portion of the legislative history of the Housing and Rent Act of 1949, and the congressional policy declaration on decontrol, reflected a congressional intent to decontrol as rapidly as possible. I could cite many other phases of the legislative history, such as the debates on the floor of Congress, to support this conclusion.

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21 Section 201(a)(b) of the 1947 Act, 61 STAT. 196 (1947). This declaration of policy remained the same throughout the 1948 and 1949 amendments and extensions of the original Act.

Although the power to be exercised by the Housing Expediter in decontrolling housing accommodations is broad, nevertheless it is by its nature a power properly granted to the Executive Branch. It calls for the exercise of sound discretion after a complete survey of the facts. In this sense it could be argued that this is not a delegation of legislative power at all. The Administrator must determine whether the demand for housing has been reasonably met. This calls for a survey of housing conditions. He must consider such factors as population trends, employment trends, vacancies in different rental ranges and the amount of new construction. This information is gathered from various sources such as surveys and consultations with local governmental authorities, labor organizations, real estate organizations, tenant associations, civic bodies and veterans' organizations. It can readily be seen that all of this is an administrative task appropriately delegated to the Administrator by the law-making body.

The Power to Regulate Evictions:

Another broad delegation of power to the Housing Expediter under the existing federal rent control law is the power to regulate evictions from controlled housing accommodations. In some respects this is the broadest delegation of all. Eviction control is the heart of effective rent control. If landlords were permitted to evict tenants in areas of acute housing shortage in any case where a lease or rental agreement expired, constant pressure would be brought upon tenants to make undercover payments in excess of the legal maximum rents, or to purchase properties at highly inflated prices in order to remain in possession.

In the Emergency Price Control Act of 1942, the Price Administrator was authorized, by regulation or order, to:[22]

22 56 STAT. 26 (1942).

> . . . regulate or prohibit . . . speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in . . . rent increases . . . inconsistent with the purposes of this Act.

The regulations which were issued by the Price Administrator in accordance with this delegation of power provided, in general, that no tenant could be evicted from controlled housing accommodations unless he obtained a certificate relating to eviction from the Price Administrator, except in cases where he failed to pay the rent, committed a nuisance, or violated a substantial obligation of his tenancy, and then only if proper notice was given to the tenant and the local area rent office. The regulations provided for the issuance of eviction certificates where the landlord or his immediate family wished to occupy the premises, where a prospective purchaser desired to occupy the premises, or where the landlord intended to make substantial alterations which could not be made while the tenant was in occupancy, or desired to demolish the accommodations. Certificates relating to eviction were also issued in the case of cooperatives where eighty per cent of the tenants in occupancy held stock or other evidence of interest in the cooperative and were entitled to possession of the accommodations under a proprietary lease, or otherwise. The Price Administrator, under his regulations, retained the general authority to issue eviction certificates in every case where he found that removals or evictions of the character proposed were not inconsistent with the purposes of the Act or the regulations, and would not be likely to result in the circumvention or evasion thereof.

Thus the Price Administrator, for example, issued certificates where he found that the landlord in good faith intended to withdraw the premises from the rental market. The regulation also made provision for "waiting

periods," which required the landlord to wait a certain period of time after the issuance of the certificate before he could institute a court action to evict a tenant.

In the Housing and Rent Act of 1947 as originally enacted, Congress failed to give the Housing Expediter authority to regulate evictions. Instead, the Act specifically provided certain restrictions on the eviction of tenants from controlled housing accommodations. The eviction provisions in the 1947 Act were very similar to the provisions in the regulations issued by the Price Administrator under the Emergency Price Control Act of 1942, as amended. One important distinction, however, was the fact that in the 1947 Act there were no specific restrictions on evictions of tenants by purchasers of stock in a cooperative. After the passage of the 1947 Act, cooperatives were hastily organized in many parts of the country, and attempts were made to evict the tenants, on the theory that the holder of a proprietary lease in a cooperative was a landlord who sought to recover possession for his own use and occupancy.

At the hearings preceding the enactment of the Housing and Rent Act of 1948, there was much testimony adduced about the "cooperative racket." As a result of this disclosure, Congress, in the 1948 Act, limited evictions from cooperatives to situations where at least sixty-five per cent of the dwelling units in the premises were occupied by tenants who held stock in the cooperative corporation or association, and because of such ownership were entitled to proprietary leases. The 1948 Act also permitted eviction where the landlord wished to withdraw his housing accommodations from the rental market.

As I have pointed out, under the 1947 and 1948 Acts, the Housing Expediter had no authority to regulate evictions. Specific limitations on the eviction of tenants were contained in both Acts. In these instances Congress de-

tailed the legislation. The eviction provisions in the law read like an Administrator's regulation. "Detailing" legislation is frequently fraught with as much danger as delegating broad powers. Legislation in such instances often lacks flexibility. Congress cannot completely anticipate the various factual situations to which the law will apply. When there is no discretion to be exercised in the application of a law, many "hardship" situations are created and much injustice results.

The courts of our land found that their hands were very much tied by the eviction restrictions contained in the 1947 and 1948 Acts. In many instances they were confronted with hardship cases in which, if discretion had been permitted, they would have allowed eviction, but the rigidity of the law prohibited the exercise of discretion. Under the regulations issued by the Price Administrator pursuant to the provisions of the Emergency Price Control Act of 1942, as amended, the Administrator very wisely retained power to issue certificates relating to eviction which were "not inconsistent with the purposes of the Act or this regulation. . . ." This discretionary authority took care of the exceptional hardship cases which did not come within the purview of the specific provisions of the regulation.

At the hearings preceding the enactment of the Housing and Rent Act of 1949, the Housing Expediter called to the attention of the congressional committees that there was a current "black market" in rents, and that this was due in part to the fact that the Housing Expediter could not control evictions. He pointed out that a great many tenants were forced to pay over-ceiling rents because of threats of eviction. The Expediter further contended that if he were authorized to regulate evictions, he would be in a position to look into the landlords' good faith when they sought to recover possession of rental units. He also

called the committees' attention to the fact that under the 1947 law, which left all eviction problems to the local courts, there was a complete lack of uniformity in the application of the law, resulting in discrimination. It was promised that if the power to regulate evictions were restored, the regulations would provide a means of evicting "undesirable tenants," and tenants who did not pay their rent, or who violated the terms of their rental agreement, and that such cases would be left entirely to the local courts. The Housing Expediter stated that if he were given the power to regulate evictions, he would reinstate the eviction certificate procedure, which would give him an opportunity to look into the good faith of the landlords and would give tenants a period of time after the issuance of a certificate within which to find other accommodations.

It was thus that the Housing and Rent Act of 1949 delegated to the Housing Expediter authority to issue regulations pertaining to the eviction of tenants in controlled housing accommodations in the following language: [23]

> Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act.

Here, again, in the language of the Act, we seem to have an extremely broad delegation of power to an Administrator. However, as in the other illustrations previously discussed, when the delegation is viewed in the light of the previous legislative history prior to the enactment of the Housing and Rent Act of 1949, it can be seen that there are certain restrictions placed upon the interpretation of this provision.

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[23] Section 209 of the Act, *supra* note 3.

We have had a rather unusual legislative history preceding the enactment of this provision in the 1949 Act. As we have noted, under the Emergency Price Control Act of 1942, the Price Administrator was authorized to regulate evictions in very general terms. The regulations issued by him were subject to congressional review each time the Emergency Price Control Act was extended, but Congress made no change in the basic law relating to evictions. The Housing and Rent Act of 1947, which superseded the Emergency Price Control Act of 1942, as amended, so far as rent control is concerned, contained specific limitations on evictions, which were in general patterned after the regulations issued by the Price Administrator under the former law. At the congressional hearings prior to the enactment of the Housing and Rent Act of 1949, as we have seen, the Housing Expediter requested Congress to restore to him the authority to regulate evictions. He assured the committees that if such power were given to him he would, in general, reinstate the provisions of the regulations issued by the Price Administrator under the Emergency Price Control Act of 1942, as amended. Thus, it can be assumed, on the basis of this legislative history, that it was clearly intended by Congress that the limitations placed upon the eviction of tenants would be substantially the same as they were in the regulations issued under the Emergency Price Control Act of 1942, as amended, and the provisions contained in the original Housing and Rent Act of 1947.

Conclusions

This analysis of three of the phases of delegation of power to a federal Administrator under the federal rent control law reveals some of the guideposts which the Administrator may follow in determining congressional intent. As the need for broader delegation of power becomes more imperative, these guideposts increase in significance. Although the ideas I have expressed may seem quite obvious to the

legal scholar, nevertheless they demand reiteration if the spirit of the doctrine of separation of powers is to be maintained. Under our representative form of government, the will of Congress ultimately must be considered to represent the will of the people, and every effort should be made by the Administrator of a federal law to determine what that will is.

Of course, there are broad delegations of power which vest in the Administrator wide areas of discretion which are not delineated by congressional intent. In exercising these discretionary powers, the Administrator must bear in mind that it is his duty not only to protect the rights of individuals affected by the law, but to act in accordance with the general well-being of society. In carrying out his responsibilities to the individual and to the public at large, he must make every effort to further government efficiency. Private rights under the law are as often defeated by inefficient administration as by improper and loose interpretation of the law.

It should be noted, also, that the Administrator, in issuing regulations implementing a federal law, should not rely too heavily upon the doctrine that the parties affected by the law may find their remedy in the courts of law. Although it is true, under our system of government, that the courts have the ultimate authority to construe the law, and may set aside regulations or orders issued by the Administrator where he has exceeded his authority or acted arbitrarily, nevertheless the Administrator should frankly face the fact that court reviews are frequently slow and costly, and that in many instances the right of judicial review is an empty right.

The regulations issued by the Administrator should be as detailed as possible, but still sufficiently flexible to cope with varying and changing situations. Where the Administrator, because of the nature of the law, is required to

delegate to subordinates considerable authority to make individual determinations, the detailing of a regulation prevents arbitrary action by the subordinate. The Administrator is in an entirely different position in drafting a regulation than Congress is in making a law. The Administrator is always "in session," and can therefore at any time amend a regulation where the necessities of the situation require.

In this article I have attempted to point out some of the responsibilities of the Administrator in carrying out federal laws containing broad delegations of power. By a recognition of these responsibilities, the Executive Branch of the Government will contribute its part toward the maintenance of the democratic process. In this era, when the world is divided between all-powerful States and countries which still protect the rights of individuals and the human dignities, we should make every effort to see that democracy operates in the most effective and successful manner possible. As our late President Franklin D. Roosevelt said:[24]

> Will it be said "Democracy was a great dream, but it could not do the job"? Or shall we here and now, without further delay, make it our business to see that our American democracy is made efficient so that it will do the job that is required of it by the events of our time?
>
> I know your answer, and the answer of the Nation, because, after all, we are a practical people. We know good management in the home, on the farm, and in business, big and little. If any nation can find the way to effective government, it should be the American people through their own democratic institutions.

Tighe E. Woods

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24 *Message of the President of the United States Transmitting A Report on Reorganization of the Executive Departments of the Government*, Sen. Doc. No. 8, 75th Cong., 1st Sess. 2 (1937).